

Responsiveness Summary for the Proposed Atlantic Fleet Weapons Training Area Federal Facility Agreement

On September 27, 2007, the U.S. Environmental Protection Agency (EPA) announced the availability to the public of the proposed Federal Facility Agreement for the Atlantic Fleet Weapons Training Area (Agreement). The public was informed that it could review and comment on the Agreement, and the notice included publication of such availability in the publication “Primera Hora” on September 27, 2007. See the attached copy. This public notice included information advising the public as to the availability of the Agreement and the location of the Administrative Record for the Site. EPA accepted comments from the public for a 45 day comment period, consistent with the Agreement, which commenced on September 27 and concluded on November 13, 2007. EPA received nine comments, and it has transmitted copies of these comments to the other parties to the Agreement, namely the Commonwealth of Puerto Rico (by notifying the Puerto Rico Environmental Quality Board, or EQB¹), the U.S. Navy, and the U.S. Department of the Interior (by notifying the Fish and Wildlife Service) (hereinafter the four parties are collectively referred to as the Parties). Six comments were provided via email from the following individuals:

Lenny Siegel, on behalf of the Center for Public Environmental Oversight (CPEO), dated October 24, 2007;
Lisa Long, received on November 10, 2007;
Betsy Palumbo, received on November 10, 2007;
Janice Palma-Glennie, received on November 11, 2007;
Deborah B. Santana, received on November 12, 2007, and
Shannon Taylor, received on November 13, 2007.

The remaining three comments were received via regular mail from the following individuals or entities:

Nilda Medina and Dr. Jorge Colón, on behalf of the Committee for the Rescue and Development of Vieques (CPRDV), dated November 12, 2007 (CPRDV #1);
Felicita García González, dated November 13, 2007, and
Robert Rabin Siegal, also on behalf of CPRDV, dated November 13, 2007 (CPRDV #2).

The following is a summary of the comments and responses thereto. Four of the six comments contained in the electronic email messages pertained to military activities in Hawaii and the commenters’ opinions that conditions in Hawaii must be addressed. To the extent that the comments referred to the Agreement or the Atlantic Fleet Weapons Training Area, a general sentiment was expressed that the Island of Vieques should be cleaned up, but no specific comments were made. Otherwise, the commenters requested that certain Hawaiian areas be

¹ Refer to Attachment A for a complete definitional list of the acronyms used in this responsiveness summary.

investigated, included on the CERCLA National Priorities List, and addressed, including areas with alleged depleted uranium contamination.

Response: The issues related to addressing potential military contamination in Hawaii is beyond the scope of being a comment relevant to this Agreement.

The comments provided in the remaining two e-mail comments (from CPEO and Ms. Santana) and the three comment letters are broken down by general category, below, under the underlined headings.

Translation of Documents into Spanish

CPRDV (CPRDV#2) submitted a comment that all documents related to critical issues, such as the topic of decontamination on Vieques, must be written in the language of the community; the fact that the Agreement appears only in English not only insults the Spanish speaking people of Vieques, but it is also a blatant violation of federal laws and agreements related to environmental justice.

Ms. García González requests that all documents related to the Vieques cleanup process be available for public comment and be translated into Spanish for the benefit of all those persons, like herself, who are unable to make comments about the issue because of a lack of comprehension in English.

Ms. Santana commented on the importance of having all documents translated and available in their entirety in Spanish. She posits that this would promote greater interest among the Puerto Rican people in general – and among the Vieques community in particular – in the “public participation” process that the U.S. federal government requires through multiple regulations, laws, and directives.

Response: These comments touch on two integrally related issues - one being translation of documents into Spanish and the other being the availability of documents generated during the cleanup of the Site for public comment. As for the translation question, a summary in Spanish of the Agreement currently exists and is available to the public at the Navy and EPA offices and site repositories and at the EQB office in Rio Piedras. Also, it is intended by the Parties that certain documents will be translated into Spanish, such as periodic informational newsletters and flyers, executive summaries of significant reports, and summaries of documents announcing remedy selection decisions. Proposed Plans, which are document offered for public comment which set forth proposed cleanup actions, will also be translated. Furthermore, the Parties recognize that the complexity of some documents such as reports, concept documents, and work plans makes them difficult to understand for those without technical or scientific expertise. Consequently, to assure an effective community involvement throughout the process, the Navy will prepare summaries (in both English and Spanish) to accompany the release of reports to the public. All reports and any such summaries will be available at the Navy and EPA offices and site repositories and at the EQB office in Rio Piedras. The Parties also intend to hold frequent, periodic informational meetings near the Site which will be available in Spanish. However, it should be noted that there is no legal requirement that all document associated with this cleanup

effort be translated into Spanish. The federal Government cannot commit to translating all of the many voluminous technical documents, many of which are hundreds of pages long, which will be generated over the many years which response actions are anticipated at this Site. Contrary to the comments, translation of such documents is not required by law or regulation, as suggested.

The second aspect of these comments (pertaining to assistance in understanding technical comments) is addressed further, below, in the community participation section, the Restoration Advisory Board section, and the Technical Assistance for Public Participation section.

Community participation

CPRDV (CPRDV#2) commented extensively on issues related to public participation in the cleanup process at the Site. The claim was made that no governmental entity made any attempt to provide community education about the proposed Agreement, and none of the Parties nor the Puerto Rico Department of Natural Resources or the Municipality of Vieques took the initiative to meet with community groups to explain the implications of the Agreement. The commenter also asserted that the newly appointed EQB representative for the cleanup under the Agreement has never visited the island of Vieques. CPRDV points out in this comment that it does not know who this person is or what qualifications he or she might have related to the Site or what work experience might prepare this person for this important project.

EQB has responded as follows: The cleanup of the Site is an interagency effort, and the community will have an opportunity to participate in the various comment periods along the way as various cleanup decisions are being proposed. In addition, presentations have been made in Restoration Advisory Board (RAB) meetings, and agencies' representatives are available, at the RABs and between such meetings, to meet with community representatives. No one contacted EQB requesting a meeting regarding this matter.

As for the second point, assuming the commenter is referring to Josefina A. González, Esq., we would like to respond by informing that the EQB president designated Josefina A. González, Special Assistant, to handle the issues regarding the decontamination of Vieques. Ms. González is an attorney, and she participated in the Transition Committee for Vieques and Culebra while she worked as an Assistant Legal Advisor for former Governor Calderón. Since August 2007, she has visited the island four times to attend RAB meetings and a meeting requested by the RAB members regarding EQB's "No Further Action" Resolution. Nevertheless, as of April 1, 2008, the EQB President will designate Wilmarie Rivera, Federal Facilities Coordinator, as EQB's representative in the cleanup efforts at the Site.

CPRDV (CPRDV#1) commented that the Vieques community supports the Commonwealth's involvement through the participation of EQB because it feels that it will result in more independent environmental studies and better citizen participation in the decision making, but this sentiment is conditioned on EQB affecting a change in the qualitative and quantitative way in which the environmental studies are performed. It feels the interaction with the community must be handled so as to assure that the cleanup does not harm the public and the environment and that there is effective community participation throughout the process. To achieve this, CPRDV suggests that EQB must do the following:

A. Carry out independent environmental studies, not only relying on samples collected by Navy contractors. The EQB must provide an effort to identify if other areas in Vieques have been affected adversely by the Navy's activities. To do this, EQB must begin an aggressive program to identify citizens who may have information about the places on which the Navy conducted military practices and released materials so that all such areas may be identified, surveyed, and if contaminated, cleaned up.² This process would include identifying and interviewing all former civilian workers (including those from the Roosevelt Roads facility area) that might have information about the location of the open burning/open detonation areas in the Live Impact Area (LIA) and additional activities like the burying of munitions and other contaminants, including public notices in the print media, radio, and television. The cleanup work should not be based only on the Navy's files and aerial photography because they are insufficient.

The commenter suggests the radiological defense laboratory at the Former Naval Shipyard on Hunter's Point, San Francisco, California as an example of such a plan.³ The Vieques community organizations request that the Hunter's Point example be followed and that those people who worked for the Navy are found in order to locate the correct areas where hazardous wastes were buried and released and to reach new results on the way to effectively Decontaminate the Site.

B. This commenter also requested that EQB meet periodically with the Vieques community, at least before each meeting of the Site's RAB, to discuss the cleanup status. This commenter felt that because EQB is the regulatory agency, their role is to assure the environmental quality of Puerto Rico. Therefore, even though the Puerto Rican voices, in this case, the Vieques people, should be heard by EQB, the Vieques community wants to be informed

by EQB before its meetings with the Navy, Fish and Wildlife Service, and EPA about the actual work and not only those tasks which are pending. In these meetings, the EQB representatives should be able to explain their comments and objections to the Navy's proposals for each

² The commenter states that there are persons who worked at the observation post OP-1 who offered testimony that, for example, more than one open detonation event was held daily at the open burning/open detonation area located on the eastern end of Vieques. Many residents from the civilian zone support this claim that they heard more than one detonation per day when the detonation events were being held. The commenter asserts that the Navy's position is that no more than one detonation event occurred daily.

³ At Hunter's Point, the commenter asserts that the Navy alleged that there was no contamination information generated in its lab, but the community organized itself to pressure the Navy to perform an investigation to identify former employees to be interviewed about possible waste disposal not documented by the Navy. That pressure made it possible to uncover newly identified documents about experiments performed at the base. All of that generated useful information that will be useful for the clean-up of that site.

environmental decision document and explain how the EQB, through offering alternatives, is protecting the health and environment of Vieques. This would allow the Vieques community to evaluate the quality of EQB's regulatory work and help the community effectively participate in the meetings with all regulatory agencies and the Navy, the way in which the RAB meetings are actually conducted when an environmental decision document is presented. The screening role of the EQB, if any, has been integrated into the document making it difficult for the community to determine what the EQB does. Therefore, the commenter recommended that the EQB hold meetings in Vieques every two months to let the community know about their screening work and environmental monitoring of all Vieques work.

EQB has responded as follows: EQB/EPA have observed field sampling activities to ensure appropriate procedures are followed. EPA has also collected split samples for analysis. In addition, the Navy analyses are validated by an independent third party, in order to ensure appropriate analytical procedures. The identification of sites needing to be addressed is based on multiple sources of information: historical records, aerial photos, and interviews with former workers. The community members are welcome to bring forward any additional factual information to EQB (and/or to the other Parties to the Agreement). EQB will make sure that any new sites identified based on factual information will be investigated. It should be noted that this was done at Roosevelt Roads, and an additional site was added to the sites to be investigated at that facility. EQB strongly encourages community members to participate fully in sharing relevant and important information with it.

EQB representatives attend RAB meetings regularly and have always been available to meet with community representatives as requested. All RAB members have their contact information in case there is a need to communicate with them between scheduled RAB meetings. EQB encourages community members to contact its representatives as often as needed because EQB values its relationship with the community.

EQB recognizes that this Agreement represents an achievement for the Commonwealth of Puerto Rico because it guarantees its involvement, as co-regulators, in the decision making process of the cleanup. EQB is truly committed to have an active participation in order to ensure that the concerns of the community of Vieques are addressed and that the cleanup is fair and comprehensive. We can only accomplish this through active, bilateral communication with the community.

EPA Response: We agree with EQB's characterization of the oversight and monitoring which is and will continue to take place.

Public Safety

CPRDV (CPRDV #2) commented that the Agreement addresses the importance of the health of the community but does not recognize the damage to health resulting from decades of environmental destruction. The commenter also points out that the Agreement fails to mention the widespread objections of the public to the open detonations which occurred during military operations and continue to occur on the Eastern end of the Island of Vieques as part of the cleanup.

Response: The commenter is correct that the CERCLA process is designed to assess and address current environmental conditions which may pose a risk to human health or the environment. The statute is not designed to address any adverse health conditions which may exist in individuals who may have been exposed to hazardous materials, nor has Congress provided authority under these environmental laws to address such situations. As for the detonations, the military activities have ceased, and the remaining detonations are related to “disposing” of ordnance which is found remaining from the prior operations.

Restoration Advisory Board (RAB) Issues

CPRDV (CPRDV #2) commented that the RAB, created by federal law and manipulated by those very federal agencies responsible for the horrendous environmental crisis in Vieques (EPA, FWS, and Navy), operates in a way totally inconsistent with the notion of public participation. Meetings occur only four times a year, meetings are directed by the multi-million dollar corporation hired by the Navy to perform the cleanup and, among other tasks, assure the “community participation” mandated by applicable federal laws. During two years, the community members on the RAB protested the lack of consideration for their concerns expressed in these meetings. Also, the majority of the “community” members of the RAB at present are not from Vieques! The Vieques RAB does not promote, even in minimal terms, dissemination in our community of important information about the cleanup process. For these reasons, it is our opinion that the Vieques RAB does not constitute an example of community participation in the decontamination process, as mandated by related federal laws.

CPRDV (CPRDV # 1) commented that effective citizen participation is not being accomplished through the actual RAB, thus the community reserves the right to propose different alternatives for effective community participation on the environmental works and decontamination in Vieques.

Response: the Navy operates the RAB in full accordance with applicable statutes and regulations. The Defense Environmental Restoration Act (DERA), enacted in 1986 as part of the Superfund Amendments and Reauthorization Act, forms the authority under which the Navy executes the Defense Environmental Restoration Program (DERP). DERA is codified at 10 U.S.C. 2701-2710, and has itself been amended since its original enactment. The Restoration Advisory Boards (RABs) are created under DERA’s authority, 10 U.S.C. 2705(c), (d), and are governed by regulations published at 32 C.F.R. 202. The purpose of a RAB established under this authority is to facilitate informed community involvement. To that end, this RAB is co-chaired by a member of the community and encourages community participation. The Navy is also planning to hire outside technical assistance for the RAB members in their review of the scientific and engineering documents associated with the cleanup efforts. A Community Involvement Plan (CIP) was completed in June 2007 which was developed with input and review by the public and stakeholders in the cleanup process. This document identifies the multiple community input and output tools and activities utilized during the Navy’s cleanup efforts.

CPRDV (CPRDV # 1) commented that there are additional ways in which the RAB has

not been effective, such as:

(A) few RAB meetings have been held each year, and their regularity has been inconsistent. Sometimes they meet every three months, sometimes every four and even every five months. There are RABs [for other CERCLA sites] in the United States that meets monthly. Intervals between Vieques RAB meetings most need to be regulated and be held more frequently. In section 35.3 of the Agreement, it should mention the expected minimum meetings per year. The commenter recommends a minimum of six meetings per year.

(B) contrary to RABs at other federal facilities, where commissions have been created and the community participates in a way that, between RAB meetings, RAB members meet and discuss particular aspects of the problems addressed by the RAB so they are active for more than just the RAB meetings, the RAB members only held meetings periodically every three, four, of five months with the Navy representatives, contractors and regulatory agencies, and most of the RAB members don't do anything else until the next meeting.

(C) the RAB has not received any reports that show in detail the contracts that the Navy has awarded to contractors. In order for the community to control the use of the funds assigned for the Vieques cleanup work, they must have detailed information as to how the contractors have used the funds assigned under those contracts. Knowing only the total amount of the contract does not allow the community to screen the participation of these contractors in the Vieques cleanup work.

Ms. Santana comments that in section 35.3 of the Agreement regarding the RAB, it states that the RAB meetings are to be held in Vieques regularly, but she asserts that their frequency varies. She asserts that the Vieques RAB has met not more often than once every three months – and sometimes five months have passed without a meeting. Generally the date for the next meeting is determined only a month ahead of time (and sometimes even less). Given that half of the “community members” on the RAB are not full-time residents of Vieques – which in itself poses problems for the stated purpose of representing the Vieques community – the practice of holding relatively few RAB meetings without much prior notice has a negative effect on public participation.

Response:

(A) RAB meetings will be held in accordance with the governing regulations, and the Navy will take measures to ensure that RAB meetings are well publicized throughout the community;

(B) members of the RAB are free to meet outside of regularly scheduled meetings with the Parties or the public, and

(C) the RAB's duty is to review and comment upon the scientific and engineering aspects of the remedial work, and by doing so help to inform the Parties' decision-making process. The contracting mechanisms which the Navy uses to undertake the remedial work are governed by federal law and are beyond the scope of the RAB's charter.

TAPP/ Technical Support (not related to translation into Spanish)

CPRDV (CPRDV #2) comments that the community needs financial assistance so that it can translate the Agreement into Spanish, hire Puerto Rican scientific advisors who have the

confidence of our community, organize community workshops, and perform other work needed to disseminate information about the Agreement, and it further requests an extension of time (of at least three months) for submitting public comments on the Agreement.

CPRDV also comments that the technical environmental assistance for the Vieques community through the Technical Assistance for Public Participation (TAPP) program has not been hired for years. The community's right to be able to have an advisor that works along with them to better understand the documents and the environmental responses has been violated by the Navy's carelessness regarding the issue of the TAPP environmental technical advisor. The community should not be without this advisor at any moment. The inadequate way in which the Navy has handled this issue makes the commenter think that it is a strategy to leave the community without environmental counseling at crucial moments in the environmental process. Additionally, the commenter asserts that it knows of other RABs where the technical advisor has been funded for much greater sums (up to \$90,000) than what is being offered for the Vieques TAPP contract, and the commenter surmises that this fact may explain why there have been difficulties getting advisors interested in the contract for the Vieques community.

CPRDV (CPRDV #2) comments that, on multiple occasions, it has denounced the lack of funds available to the community to contract for services of Puerto Rican consultants and scientists who are in solidarity with our people to help translate this type of document into plain, understandable language.

Ms. Garcia Gonzalez comments that when trying to read and understand the Agreement, she could not understand it because of the complexity of the vocabulary and because of the lack of a technical advisor to guide her through it. She urges that the pertinent agencies provide the community with a technical advisor who can help them with these issues.

CPEO comments that while completion of the Agreement is a major step forward, they are concerned that it does not clarify, for individuals who do not have significant experience in environmental law, key issues of concern to the public - at a site with a long history of intense public concern.

Response: The Agreement identifies a process for the Parties to address Facility cleanup. The technical basis for the cleanup of the various areas and decontamination at the Site shall be presented in documents that will be generated during this process. The Navy is currently seeking to hire a qualified technical assistance contractor for the RAB to assist the RAB by interpreting scientific and engineering issues concerning the nature of environmental hazards at the installation and the restoration activities conducted, or proposed to be conducted, at the installation through the TAPP provisions of the DERA. See 10 U.S.C. 2705(e).

As for the requested three-month extension of the comment period, that request cannot be granted. Logistically, it is problematic because an extension cannot be fairly granted to one party only, and thus in order to provide adequate notice to all of an extension of time, we would need to republish notice of the extension of the comment period in the local press, which would cause an additional delay of the effective date beyond the requested extension. Nationally, forty-five days is the standard time period provided in all CERCLA federal facility agreements, and

federal regulations for other, similar non-federal facility agreements typically require only thirty day comment periods. Practically, when balancing the Parties' goal of working under the Agreement, and complete the transition from the RCRA program to the CERCLA program, against the single request for significant additional time (a 200% increase added to the length of the comment period), it has been determined that the request cannot be granted.

Future use - barring military uses

CPRDV (CPRDV #2) comments that it rejects any phraseology in the Agreement or any other document relative to Vieques that opens the way for future military use of Vieques. The commenter demands a clear declaration in this document blocking any possible future use of Vieques for military activity.

CPRDV (CPRDV #1) also states that the community objects to section 15.1 of the Agreement because it indicates that the President can, through an Executive Order, paralyze the cleanup work at Vieques for a year and reinstate military operations if necessary to protect the interest of homeland security. The community understands that this allows that military practices in Vieques range zone would be allowed under the pretense of homeland security.

CPRDV further comments that the Vieques community expects that the Agreement will categorically express that Vieques will never be used again for military practices. However, if the CERCLA law allows the Presidential action and the Agreement cannot supersede the CERCLA law, then the Agreement must at least express that the intention of all signatories is that Vieques would never be used again for military practices and that the decontamination work is being done to ensure the health, well-being, and the best environment.

Ms. Santana commented that she feels there is much concern in the community that the lands could once again be utilized for military practices because they remain under federal government control, and the customary use by Viequenses is criminalized. The language that appears in section 15.1 regarding exemptions via presidential executive orders should specify that it does not contemplate the renewal of military practices in the lands of Vieques.

Response: The Agreement is one mandated by CERCLA, an environmental law pertaining to environmental restoration. EPA's mission and authority in this regard, with the support of EQB, does not include directing future land uses. FWS is the current custodian of most of the Site property, per Congressional mandate, but that may change as it is within the authority of Congress to alter that decision. None of the Parties have control over what Congress may or may not choose with regard to future uses of this federal land, and it would be unlawful and inappropriate for executive agencies to be barring uses or expressing preferences, respectively, in such an agreement with a jurisdictional purpose and scope limited to environmental restoration. Furthermore, the language of section 15.1 is standard language for this type of cleanup agreement. It merely reiterates and summarizes an existing statutory provision of CERCLA (Section 120(j)). Section 15.1 should not be read to infer that the federal government has any plans to resume military operation on the Island of Vieques, and it does not expand any authorities the President does not already have in this regard.

Cleanup standards and Future use assumptions

CPRDV (CPRDV #1) comments that the decontamination levels for the areas affected by the former military operations on Vieques should assume a future human presence in those areas. The Vieques community expects that these lands, if found to be contaminated, will be cleaned up to assure protection of human health and the environment. The community has great expectations to use those places in the near future within a sustainable development for all Vieques territory, thus the decisions that are made must consider a future human presence on those areas, like in the past.

CPRDV further comments that the Vieques community reiterates that they are not in agreement with the designation of the 900 acres of the former maneuvers area as a “wilderness area” because under the Wilderness Act of 1964’s definition, a wilderness area is an area that has not been affected by humans, which is opposite to the maneuver area that was mistreated for sixty years of the Navy’s military practices.

CPEO questions whether decisions about the demilitarization and disposal of ordnance are subject to the Agreement. The question is asked because it is an issue repeatedly raised by local stakeholders. The commenter acknowledges that it raises difficult questions weighing near-term safety against releases potentially causing long-term hazards to public health and the environment. The commenter expresses a view that the National Contingency Plan (the CERCLA regulations) is an excellent tool for resolving such competing requirements.

Response: Congress designated a portion of the Island of Vieques as a Wilderness, and as discussed above, it is beyond the legal authority of the Parties to change Congressional actions. The cleanup levels will be based on the anticipated future land use. The Agreement lays out the process for the Parties to assess and select the areas to be cleaned up at the Site and implement those actions. The demilitarization of ordnance is an integral, if not the most significant, part of this process both on land and in the off-shore areas at the Site.

Funding Question

CPRDV (CPRDV #1) comments that in the annual Site Management Plan (SMP), in Table 3-1, fiscal years 2007-2008 reflects that environmental funding for East Vieques for fiscal year 2010 will be drastically reduced to \$179,000, when for fiscal years 2008 and 2009 the proposed amount is \$1.99 and \$1.7 million, respectively. The commenter asks why is this dramatically reduced? The community should be able to participate when considering the budget assigned for the Vieques work. Circumstances like the one evidenced in Table 3-1 should be considered and discussed with the community in order for the community to participate in the annual SMP preparation.

Response: The commenter appears to have misinterpreted the table. The total amounts currently budgeted for fiscal years 2008, 2009, and 2010 for both the environmental and munitions aspects of the cleanup are approximately \$22,219,000, \$21,902,000, and \$20,361,000, respectively. The Congressional budget is established from estimated cleanup costs that are based on the knowledge of the conditions at the Site at that time and are adjusted as more

information becomes available. The Navy reviews the program progress annually through the update to the SMP and makes adjustments as necessary to the SMP schedule based on Site prioritization and anticipated Navy funding availability.

Environmental Justice

CPRDV (CPRDV #1) comments that the Agreement should include a section which clearly indicates how the requirements of Presidential Executive Order 12898 regarding the Environmental Justice for minority and low income communities will be followed. The Agreement should include a section addressing when (and how) the agencies will hold the “environmental justice reviews” ordered by the Presidential order, as in this case for Vieques.

Response: Executive Order 12898 obligates every federal agency to conduct its programs that affect human health or the environment “in a manner that ensures that such programs, policies and activities do not have the effect of excluding persons (including populations) from participation in ... such programs, policies and activities because of their race, color, or national origin.” See Executive Order 12898, Sec. 2-2. As regards the cleanup at Vieques, the RAB is specifically designed to solicit local public comment on an ongoing basis throughout the cleanup.

Acronym List

Ms. Garcia Gonzalez requested that a list of terms and definitions of the abbreviations used in the document be placed in the left margin of each page or at the bottom of each page to facilitate the reading for those persons who are not familiar with these types of abbreviations.

Response: A list of Acronyms used in the Agreement will be included in the SMP and is available at the Navy and EPA offices and Site repositories and at the EQB office in Rio Piedras (as is such a list for the terms used in this document attached hereto).

TCRA Permit Issue

Ms. Santana commented that it is important to clarify which work projects for decontamination will fall under Time Critical Action Removal (TCRA) and which are in addition to TCRA. She states the following: TCRA cleanup is directed toward removing unexploded munitions that pose an imminent danger to human life and that the TCRA permit of March 2005 underwent a comment period by the agencies as well as the public, and it was approved. That document identified 400 acres of the former LIA for TCRA actions to remove unexploded munitions equal to or greater than 20 mm that was found on the surface. According to the document, the time period for TCRA expired in November 2005. In addition, the manner of removing vegetation in order to reach the munitions was specified as manual cutting – which would be appropriate in an area designated as “wilderness” for conservation, where unexploded bombs are found, and that moreover is nearly inaccessible for emergency responses in case of fire.

However, in July 2006, the Navy proposed extending the TCRA until 2010 and expanding the area covered to include the entire LIA plus the Environmental Conservation Area

to the east of the LIA. This document indicated the Navy's intention to use “controlled burning” of vegetation of a “wilderness area” where unexploded munitions allegedly represent an imminent danger to human life and where it might be nearly impossible to respond to an emergency provoked by a fire. This “amended TCRA” has not been provided to the public for comment, nor has it apparently received final approval. In addition, according to the Agreement, the right to insist that the Navy complete studies of cleanup project alternatives only refers to the non-TCRA work. Moreover, the oversight responsibility of the EPA and the Puerto Rico government in response to public concerns is more restricted for TCRA work than for non-TCRA work. Therefore it is extremely important to clarify whether the Agreement is using the approved TCRA of 2005, or the amended TCRA proposed by the Navy, which has yet to receive public comment and final approval.

Response: The March 2005 “TCRA permit” which the commenter describes was actually approved in January, 2005 pursuant to the Emergency Resource Conservation and Recovery Act permit regulations, and that permit allowed for the detonation of ordnance during the period of that permit which expired in late 2005. Work performed under that permit was not, however, a TCRA. A TCRA is a type of CERCLA response action, and as with all CERCLA response actions, no permits are required for taking such actions. Furthermore, CERCLA regulations do not require any public comment period for TCRAs, notwithstanding that the Navy did seek public comment on the response action prior to initiating it. When it extended the scope of the action, it did not repeat that public comment process (and it was not under any obligation to do so under federal regulation). Thus, once the Vieques Site became a CERCLA site in February of 2005, the Emergency permit under RCRA was no longer necessary. CERCLA “removal actions”, including TCRAs, are used to address immediate environmental concerns as set out in the Agreement and in statute and regulation. Subsequent to the Site’s inclusion on the CERCLA National Priorities List, all response actions at the Site will continue through the CERCLA response action process.

Force Majeure

Ms. Santana submitted a comment regarding section 26 of the Agreement, entitled Force Majeure, which addresses forces “beyond the control” of the Navy that could affect compliance with the responsibility to decontaminate Vieques. She suggested that although some of the listed examples may be seen as “beyond the control” of the Navy (i.e., acts of God such as a hurricane), others may be controlled through proper planning. For example, the threat of uncontrolled fire would be greatly reduced if the Navy does not carry out “controlled burns”, and a lack of funding would be less likely if the Defense Department requests sufficient funding for environmental cleanup. Additionally, there is less likelihood of labor problems if the terms of employment are just. These are just some examples of situations that might not meet the definition of “Force Majeure.”

Response: The Agreement outlines the procedures necessary for the Navy, in cooperation with the other Parties, to fund, plan, and execute its remedial actions. The provision mentioned by the commenter is standard, “model” language which has been included in over one hundred such agreements between the Department of Defense and the regulators (i.e. EPA and related states). It has been determined by the Parties to be acceptable, and the terms have not proven to

be problematic at the many other sites where similar language has been agreed to.

Whether Munitions Addressed

CPEO questioned whether munitions that were fired or dropped on or near Vieques are fully subject to the investigative and remedial requirements of the Agreement, even if they primarily pose an explosive risk? The agreement repeatedly refers to “release of hazardous substances, pollutants, and contaminants.” Have the parties agreed to what degree those terms apply to munitions, explosives, and explosive by-products? The commenter believes all munitions response activities should be subject to the Agreement, but in the absence of a clear statement, it is not sure that they are.

Response: The Parties intend that the risks to human health and the environment posed by munitions and unexploded ordnance will be addressed under the Agreement. CERCLA defines the hazardous substances, pollutants, and contaminants which are required to be cleaned up. The Agreement adheres to that definition. Because the range at Vieques is a closed range, the existence of unexploded ordnance on that range creates the potential for a release if not an actual release, and any such releases or threatened releases will be addressed in accordance with CERCLA and its regulations. Munitions are addressed specifically in the Site Management Plan, which is an integral part of the Agreement.

CPRDV (CPRDV #1) provides a list of what it feels are solid wastes and dangerous constituents which are commonly found in unexploded ordnance, such as : lead, RDX, TNT, DNT, 2,4,6 TNT, HMX, 2A-4, 6-DNT, 4A-2, 6-DNT, 2,4-NDT, 2,6-DNT, –nitrodifenilamine, picric acid, furans, dioxins, aluminum, magnesium, hexachlorobenzene, di-n-butylfate, pentaclorofenol, antimony, molibdene, thallium, barrio, cooper, cadmium, 1,2-dibromoetane, nitroglycerin, dieldrin and arsenic.... The commenter points out that the United States General Accounting Office, in a recent report⁴, indicated that bases contaminated with military munitions might have also soils, groundwater and surface contamination from over 200 chemical substances that are ordnance constituents. The report says that human beings might have, in a long range, potential health problems, like cancer, heart problems, liver and kidneys, when they are exposed to these ordnance constituents. From those 200 chemical constituents, there are 20 of greatest concern because of their potential environmental impacts and broad use. Those particular constituents of greatest concern are in a list on Table 2 from Appendix 1 of the GAO report and should be included on the list shown in the Agreement in section VI, 6.9, of the Agreement.

Response: The environmental soil and groundwater investigations of former munitions sites require the analysis of an extensive list of hazardous constituents and explosives that are known or suspected to have been used at such military sites. If there is knowledge of any additional constituents used at the site, they would be added to the list of constituents analyzed.

⁴ The report is entitled, Military Munitions: DOD Needs to Develop a Comprehensive Approach for Cleaning up Contaminated Sites (GAO-04-147, Dec 19, 2003).

Offshore Areas

CPEO inquired to what degree are offshore areas subject to the Agreement. The commenter pointed out that Appendix B does not list any underwater sites, despite clear evidence that munitions lie in shallow waters near the island. The comment was made that such areas should be covered, and the parties should begin to add such sites to the Appendices.

CPEO also commented that it believes that there should be a wide-area visual and magnetic survey for underwater ordnance, sampling for explosive chemicals, and an evaluation of the health of coral in areas where munitions appear to lie. This should take place not only along the East Vieques shoreline but near the former ordnance disposal area on West Vieques. The Agreement should provide clear guidance for moving ahead with such an investigation.

Response: The Site as listed on the CERCLA National Priorities List includes impacted offshore areas, such as in the vicinity of the LIA and anchorage areas. The Navy intends to assess the offshore areas and take appropriate action in accordance with the risk-based site prioritization methodology. This is discussed in the Site Management Plan, Section 1.1.5, National Priorities Listing. Wide area underwater pilot project surveys have been previously conducted at the north and south bays of the LIA at the Eastern end of Vieques to identify the locations of underwater ordnance. Additional surveys are anticipated to delineate the extent of the underwater ordnance further.

Specific Comments

CPRDV (CPRDV #1) provided the following comments regarding specific changes to the text. Responses follow each comment:

1. Page 8, Section IV, 4.1 (A) where says "...as necessary to protect human health or welfare or the environment" change "or" for "and". [Response: This phrase as used is how it is used in the CERCLA statutory language and, as such, is legally appropriate.]

2. Page 9, Section V, 5.3 (B), where says "Council on Environmental Quality" changed to "Environmental Quality Board". [Response: The entity intended here is a different entity from EQB – it is a federal entity (CEQ), not the Commonwealth entity (EQB).]

3. Page 15, Section VII, 7.1 (G), where says "...are necessary to protect human health or welfare or the environment" change the "or" for "and". [This phrase as used is how it is used in the CERCLA statutory language and, as such, is legally appropriate.]

4. Page 29, Section X, 10.4 (A), where it says "...Navy will coordinate and consult with Interior pursuant to the MOAs, and with EPA", add "the Commonwealth and" before the word EPA. [Response: This language was carefully negotiated and intended as such. It reflects the respective Parties' legal, jurisdictional authority, etc.]

Conclusion

The Parties to the Agreement have reviewed and agree on the substance of the responses

provided in this Responsiveness Summary. The Parties furthermore agree that the Agreement shall be made effective without any modifications. By separate letter, EPA shall notify the other Parties in writing that the Agreement is effective. Consistent with Section 34.2 of the Agreement, the Effective Date of the Agreement shall be the date of receipt by Navy of the notification of effectiveness from EPA (the Navy has already received a copy of the signed Agreement, which would otherwise accompany the notice of effectiveness).

ATTACHMENT A

List of Acronyms and what they stand for:

CEQ - Council on Environmental Quality (federal entity)
CERCLA – The Comprehensive Environmental Response, Compensation, and Liability Act
(a.k.a. Superfund)
CIP - Community Involvement Plan
CPEO – The Center for Public Environmental Oversight
CPRDV – The Committee For the Rescue and Development of Vieques
DERA – Defense Environmental Restoration Act
DERP - Defense Environmental Restoration Program
EPA - U.S. Environmental Protection Agency
EQB - Puerto Rico Environmental Quality Board
FWS U.S. Fish and Wildlife Service
GSA – U.S. General Services Administration
LIA - live impact area
MOA - memorandum of agreement
RAB - restoration advisory board
SMP - Site management plan
TAPP – Technical Assistance for Public Participation
TCRA - time-critical removal action
U.S.C. – United States Code (citation to federal law)